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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JADIR ALEXANDER MILLER,

Defendant and Appellant.

D048716

(Super. Ct. No. CF-4839)

APPEAL from an order of the Superior Court of Imperial County, Raymond A. Cota, Judge. Affirmed.

Jadir Miller appeals an order that he register as a sex offender under Penal Code section 290.<sup>1</sup> He contends: (1) the evidence is insufficient to support the finding the crimes were committed for sexual gratification or as a result of sexual compulsion; and (2) requiring Miller to register as a sex offender violates his due process rights because

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<sup>1</sup> All statutory references are to the Penal Code.

registration is punishment and requires a jury make the relevant findings beyond a reasonable doubt.

## FACTUAL AND PROCEDURAL BACKGROUND

In December 1998, a jury convicted Miller of attempted rape (§§ 664/261), false imprisonment by violence (§ 236), and attempted murder (§§ 664/187). The court denied Miller's motion for new trial, sentenced him to 10 years in prison, and ordered him to register as a sex offender (§ 290).

After exhausting state court remedies, Miller petitioned for a writ of habeas corpus in the United States District Court for the Southern District of California. The district court granted the habeas petition in part, finding constitutional error in deficient jury instructions relating to the attempted rape count, and reversed the conviction on that count.

In May 2006, the trial court resentenced Miller to nine years in prison. However, because he had already served more than nine years, he was released. The court found Miller committed his crimes for sexual gratification or as a result of sexual compulsion and ordered Miller to register as a sex offender under section 290, subdivision (a)(2)(E).

In November 2006, California voters enacted into law Proposition 83, the Sexual Predator Punishment Control Act, Jessica's Law (SPPCA), which prohibits registered sex offenders from living within 2,000 feet of any school or park where children regularly gather (§ 3003.5, subd. (b)) and requires monitoring of registered sex offenders by a global positioning system (GPS) during parole (§ 3000.07, subd. (a)), or for life (§ 3004, subd. (b)).

We conclude there is sufficient evidence in this matter to establish the crimes were committed for sexual gratification or as a result of sexual compulsion. We are also satisfied that the registration requirement imposed in May 2006 did not constitute punishment and therefore there was no requirement to submit that issue to a jury for proof beyond a reasonable doubt. The enactment of the SPPCA after the sentencing in this case does not alter our view because the application of that legislation to Miller at this point is entirely speculative.

## DISCUSSION

### I

#### *SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING THE CRIMES WERE COMMITTED FOR SEXUAL GRATIFICATION OR AS A RESULT OF SEXUAL COMPULSION*

A court may impose the sex offender registration requirement of section 290 "for any offense . . . if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification." (§ 290, subd. (a)(2)(E).) The court must use a two-step process: "(1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197; see also § 290, subd. (a)(2)(E).) Section 290 does not require "the court find the predicate fact was proved beyond a reasonable doubt, and thus it is subject to proof by a preponderance of the evidence." (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1058.)

Here, substantial evidence supports the court's finding Miller committed the crimes for sexual gratification or as a result of sexual compulsion. The victim's torn underwear was found floating in a toilet at the crime scene; Miller's own underwear was left at the scene; the victim's bra was pushed up above her chest; her jeans were pulled down low on her hips. In addition, a witness, Laura Casillas, testified Miller raped her on two prior occasions, showing Miller's propensity and intent to rape the victim on this occasion.

The court completed *Hofsheier's* two-step analysis. It found Miller's crimes had a sexual purpose because of "the evidence and the facts surrounding the commission of the attempted murder and false imprisonment convictions" and "the testimony of one woman . . . about a prior sexual attack." It stated Miller must register "during his entire life" because "the requirements . . . will serve to give notice to the community and law enforcement in the future of the danger in our midst from this sexual predator."

Substantial evidence supports the court's finding Miller's crimes had a sexual purpose, and the court stated its reasons for both that finding and its imposition of a lifetime registration requirement.

## II

### *DUE PROCESS REQUIREMENT THAT CERTAIN FINDINGS BE MADE BY A JURY BEYOND A REASONABLE DOUBT*

"[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

(*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) The United States Supreme Court

has held registration requirements are not penal, and thus do not increase the penalty for a crime, absent legislative intent to the contrary. (*Smith v. Doe* (2003) 538 U.S. 84, 105-106 [upholding Alaska's sex offender registration statute against an ex post facto challenge].) A plurality of the California Supreme Court declared "the Legislature did not intend . . . registration [under section 290] to constitute punishment and the provision is not so punitive in nature or effect that it must be held to constitute punishment despite the Legislature's contrary intent." (*People v. Castellanos* (1999) 21 Cal.4th 785, 799 (lead opn. of George, C. J.) (*Castellanos*).)<sup>2</sup> The purpose of registration is not to punish, but to make sex offenders available for police surveillance. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) Because registration is not punitive, facts supporting the court's order requiring registration under section 290 do not have to be submitted to a jury or proved beyond a reasonable doubt. (*People v. Marchand, supra*, 98 Cal.App.4th 1056, 1058.)

Miller distinguishes cases holding the registration requirement is not punishment for persons convicted of sex offenses because those cases "were limited to the imposition of the registration requirement upon those who have been ***convicted of sex crimes***." However, he overlooks cases holding the registration requirement under the discretionary portion of section 290, for persons who committed nonsexual offenses found to have a

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<sup>2</sup> Although separate opinions emphasized different factors in reaching this conclusion, a majority of the court agreed that requiring registration under section 290 is not penal. (*Castellanos, supra*, 21 Cal.4th at pp. 792, 798 (lead opn. of George, C. J.); *id.* at p. 804 (conc. & dis. opn. of Kennard, J.).)

sexual purpose, is not punishment. (E.g., *Castellanos*, *supra*, 21 Cal.4th at pp. 798-799 (lead opn. of George, C. J.) [holding registration requirement for defendant convicted of burglary with the purpose of stealing women's underwear is not punishment for purposes of ex post facto analysis]; *People v. Marchand*, *supra*, 98 Cal.App.4th at p. 1065 [holding registration requirement for defendant convicted of stalking is not punishment for purposes of *Apprendi* due process analysis].)

Miller contends the passage of the SPPCA in November 2006 transformed registration under section 290 into punishment because of its residency restrictions and GPS requirement. On this record, we decline to decide this contention.

We first note the parties agree the principal issue is whether the provisions of the SPPCA can be applied to persons who committed crimes and in this case were sentenced before the enactment of the new legislation. That issue has not been resolved by either California or the federal appellate courts.

Two federal district courts addressing this issue have held that the SPPCA does not apply to persons convicted prior to the effective date of this statute and "who were paroled, given probation, or released from incarceration prior to its effective date." (*Doe v. Schwarzenegger* (E.D. Cal. 2007) 476 F.Supp.2d 1178, 1179, fn. 1; *Doe v. Schwarzenegger* (N.D. Cal. Feb. 22, 2007) \_\_\_\_ F.Supp.2d \_\_\_\_ [LEXIS 16244, 2007 WL 601977].)

The People concede the GPS monitoring requirements of the SPPCA do not apply to Miller. The People further agree the residency restriction of the Act does not require

Miller to move if he lived in a restricted zone before November 8, 2006. The People do contend the SPPCA prevents Miller from moving to a restricted zone in the future.

Whether the People are correct in their analysis of the effect of the Act is not before us. At the time the registration requirement in this case was imposed, the SPPCA had not yet been enacted. If and when there is some effort to apply the provisions of the new legislative enactment to Miller, he can certainly challenge such action at that time. Whether the provisions of the SPPCA will ever be applied to Miller is entirely speculative. It is not necessary therefore to resolve the constitutionality of the SPPCA in order to determine the issue before us and that is, whether a requirement for registration imposed six months before the statute was enacted constituted punishment requiring a jury trial and proof beyond a reasonable doubt.

Miller's due process rights were not violated by the court's order because registration as a sex offender under section 290 is not punishment (apart from the SPPCA's provisions) and thus a jury is not required to make the finding of sexual purpose beyond a reasonable doubt.

#### DISPOSITION

The order is affirmed.

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HUFFMAN, Acting P. J.

I CONCUR:

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O'ROURKE, J.

McDonald, J., concurring.

I agree with the majority opinion that substantial evidence supports the trial court's finding that Miller's crimes were committed with a sexual purpose and the court adequately stated its reasons for both that finding and imposition of a lifetime registration requirement under Penal Code section 290.<sup>1</sup>

Miller contends the enactment in November 2006 of Proposition 83, the Sexual Predator Punishment and Control Act: Jessica's Law (SPPCA), which prohibits registered sex offenders from living within 2000 feet of any school or park where children regularly congregate (§ 3003.5, subd. (b)) and requires global positioning system monitoring (§§ 3000.07, subd. (a), 3004, subd. (b)), transmogrified registration under section 290 into punishment. As punishment, the requisite findings Miller's crimes were committed with a sexual purpose necessary to impose the section 290 registration requirement must be found true by a jury beyond a reasonable doubt, not by a judge by a preponderance of the evidence. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 489-490.) As a result, Miller contends he is not required to register under section 290.

The majority opinion declines to address this issue because the record in this case does not contain information that the provisions of the SPPCA have been applied to Miller. The majority opinion therefore concludes it is premature to consider the effect of the SPPCA on Miller; he can assert his contention at the time the provisions of the SPPCA are applied to him. I conclude it is appropriate to discuss the applicability of the

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<sup>1</sup> All further statutory references are to the Penal Code.



SPPCA to Miller to enable him and the parole authorities to understand the limits of the section 290 registration requirements applicable to him.

In my view, the SPPCA does not apply retroactively to parolees whose offenses were committed before its effective date. Because Miller committed his crimes for which section 290 registration is required before November 8, 2006, the SPPCA's residency restrictions and GPS requirement do not apply to him.

Two federal district courts addressing this issue held the SPPCA did not apply "to persons convicted prior to the effective date of the statute and who were paroled, given probation, or released from incarceration prior to that date." (*Doe v. Schwarzenegger* (E.D. Cal. 2007) 476 F.Supp.2d 1178, fn. 1 (*Doe I*); see also *Doe v. Schwarzenegger* (N.D. Cal. Feb 22, 2007) 2007 WL 601977.) However, "the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations]." (*People v. Grant* (1999) 20 Cal.4th 150, 157.) The last act necessary to trigger application of the SPPCA is the sex offender's crime, not his parole, probation, or release from incarceration. "Application of these provisions to *crimes committed* before the measure's effective date would be 'retrospective' because each would change the legal consequences of the defendant's past conduct, since each of these provisions appear to define conduct as a crime, to increase punishment for a crime, or to eliminate a defense. [Citations.] Such application would also likely violate the rule against ex post facto legislation. [Citations]. Accordingly, these provisions may only be applied to prosecutions of *crimes committed* on or after [the effective date]." (*Tapia v. Superior*

*Court* (1991) 53 Cal.3d 282, 298-299, italics added, fn. omitted; see also *id.* at p. 302 (dis. opn. of Mosk, J.) [stating the presumption is that a measure applies "prospectively, specifically, only to offenses occurring on or after its effective date."].)

The People agree the GPS monitoring requirements do not apply to Miller. Further, the People agree the residency restriction does not require Miller to move if he lived within a restricted zone before November 8, 2006. However, the People contend the SPPCA prevents Miller from moving to a restricted zone in the future. As the District Court for the Eastern District of California noted, "[t]his interpretation of the law, which only the Attorney General has advanced, borders on the frivolous. The SPPCA makes absolutely no distinction between sex offenders currently residing within a 2,000 feet zone and those who later relocate within such an area." (*Doe I*, 476 F.Supp.2d at p. 1183.)

The court must adhere to the canon of statutory construction that requires it to "avoid an interpretation that would lead to absurd consequences. [Citation]." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) Were the court to agree with the People, a sex offender living within a restricted zone on November 8, 2006, would not be able to move across the hall of his apartment building after November 8, 2006. This is an absurd result because the offender is no more dangerous in the second apartment than he was in the first, and, more importantly, a sex offender's relocation does not change the date of his crime.

Furthermore, the court must "construe a statute to avoid doubts as to its constitutionality." (*People v. Smith* (1983) 34 Cal.3d 251, 259; see also *INS v. St. Cyr*

(2001) 533 U.S. 289, 299-300.) A contrary conclusion applying the SPPCA to sex offenders who committed their crimes before the effective date but who move to a restricted zone after the effective date might result in a violation of the prohibition against ex post facto laws. (See *Smith*, at p. 262.) Even if the residency requirement is not punishment, and thus does not violate the ex post facto constitutional provisions, application to a criminal who committed a sexual offense before the requirement's effective date and who moves to a restricted zone after the effective date would violate section 3, which explicitly states "[n]o part of [the Penal Code] is retroactive, unless expressly so declared."<sup>2</sup>

I agree with the majority opinion that "Miller's due process rights were not violated by the court's order because registration as a sex offender under section 290 is not punishment (apart from the SPPCA's provisions) and thus a jury is not required to make the finding of sexual purpose beyond a reasonable doubt." Further, because the SPPCA applies only prospectively, it does not apply to Miller and does not affect the analysis of the nonpenal purpose of registration under section 290.

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McDONALD, J.

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<sup>2</sup> Because "[e]very ex post facto law must necessarily be retrospective[,] but every retrospective law is not an ex post facto law," (*Calder v. Bull* (1798) 3 U.S. 386, 391) application of section 3 only to statutes unconstitutional under ex post facto makes section 3 superfluous and misstates the law.